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Supreme Court, U.S.
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CLERK

86-1691
NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1986

TONY RAYBURN,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the recordings of telephone conversations made by certain defendants in the case before this Court were inadmissible because the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, et seq (1982), bans the use of the fruits of interceptions made for the purpose of committing a criminal act?

(2) Whether the Court of Appeals for the Sixth Circuit erred in construing the Act -- the Court of Appeals did not strictly construe the Act according to its plain meaning, but, rather, construed the statute as if it were a civil statute?

(3) Whether the decision of the Court of Appeals for the Sixth Circuit conflicts with the decision rendered by the Court of Appeals for the Eighth Circuit on the same matter in United States vs. Phillips, 540

F.2d 319 (8th Cir.), rehearing denied, (8th Cir.), cert. denied, 429 U.S. 1000 (1976) and with the decision of the Sixth Circuit in United States vs. Jones, 542 F.2d 661 (6th Cir. 1976).

B. PARTIES TO THE PROCEEDINGS

W. Hickman Ewing and Frederick H. Godwin, Un' ed States Attorney and Assistant United States Attorney, represented the United States of America before the District Court for the Western District of Tennessee, Western Division. Mr. Ewing and Mr. Godwin also represented the Government before the Court of Appeals for the Sixth Circuit.

At the District Court level, James D. Causey served as defense counsel for Defendant, Tony Rayburn. Mr. Causey represented Mr. Rayburn through the appeal to the Court of Appeals for the Sixth Circuit.

At the District Court level and on appeal, Robert M. Friedman represented Defendant, Walter Person.

At the District Court level and on appeal, Stephen Butler and Albert Boyd represented Defendant, Howard "Ace" Underhill.

At the District Court level and on appeal, Frank Holloman represented Defendant, Pat Tata.

At the District Court level and on appeal, Tommy Jagendorf represented Defendants, Eddie Osborne and Joe Osborne.

John P. Colton, Jr. represented Defendant, Daniel Rokitka.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has been recommended for full text publication. A copy of the unpublished Opinion is included in the Appendix, separately presented.

E. JURISDICTIONAL STATEMENT

(1) The judgment sought to be reviewed was decided and filed March 6, 1987.

(2) The Defendant did not file a Petition for Rehearing En Banc nor has Defendant petitioned for an extension of time within which to file his Petition for Certiorari.

(3) The Petitioner anticipates no cross-petition for certiorari; however, the Petitioner anticipates that one or more of the Defendants in the consolidated appeal will petition for certiorari.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) Rule 901 of the Federal Rules of Evidence

(2) Rule 1002 of the Federal Rules of Evidence

(3) 18 U.S.C. §2

(4) 18 U.S.C. §371

(5) 18 U.S.C. §1084(a)

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(13) 26 U.S.C. §7262

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(Sections 39-6-601 and 39-6-602 are set forth in Appendix F and Appendix G)

G. STATEMENT OF THE CASE

On November 20, 1985, the Federal Grand Jury for the Western District of Tennessee returned sixteen (16) indictments charging thirty-five (35) individuals with violations of federal gambling and narcotics laws. Among those indictments was a five-count indictment which charged Howard "Ace" Underhill, Daniel J. Rokitka, Eddie Osborne, Joe Osborne and Walter Person with violations of federal gambling laws.

Count I charged Underhill, Rokitka, the Osbornes and Person with conducting an illegal gambling business in violation of Title 18 U.S.C. §1955.

Count II charged Underhill, Rokitka, the Osbornes and Person with a conspiracy to violate federal gambling laws in violation of Title 18 U.S.C. §371.

Count III charged Eddie Osborne with traveling in interstate commerce with the intent to distribute the proceeds of unlawful

activity in violation of Title 18 U.S.C. §1952(a)(1).

Count IV charged Underhill, Rokitka and Eddie Osborne with the use of wire communication facilities in interstate commerce to transmit gambling information in violation of Title 18 U.S.C. §1084(a).

Count V charged Underhill, Rokitka and the Osbornes with accepting wagers without having paid the Federal Wagering Tax in violation of Title 26 U.S.C. §7262 and Title 18 U.S.C. §2.

Also among the November 20, 1985 indictments was a three-count indictment charging Leck Fraley, Jr., Pat Tata, Michael Ezell, Tony Rayburn and Donald E. "Tapper" Swanton with violation of federal gambling laws. All five defendants were charged in Count I with conducting an illegal gambling business in violation of Title 18 U.S.C. §1955 and 2.

Count II charged the Defendants with conspiracy to violate federal gambling laws in violation of Title 18 U.S.C. §371.

Count III charged the Defendants with accepting wagers without having paid the Federal Wagering Tax in violation of Title 26 U.S.C. §7262.

On February 7, 1986, District Judge Robert M. McRae, Jr. denied certain motions to suppress evidence filed by Defendants Underhill, Rokitka, Eddie Osborne and Joe Osborne. Those motions concerned the execution of search warrants at an apartment leased to the Defendant Rokitka, on the persons of Rokitka and Underhill, and searches of vehicles of Rokitka and Underhill on the premises.

On February 7, 1986, Defendant, Walter Person, filed a written Motion in Limine Regarding the Suppression of Evidence to-wit: Tape Recorded Communications and/or Motion to Prohibit the Use of Intercepted Tape Recorded Oral Communications Pursuant to 18 U.S.C. §2515. The attorneys for Underhill and Rokitka orally joined in this motion and were later joined by the Osbornes on March 7, 1986.

Defendant, Tony Rayburn, filed a Motion seeking to suppress the same tape recordings on February 26, 1986.

Defendant, Pat Tata, joined in this Motion on March 5, 1986.

On February 28, 1986, District Judge McRae held a single evidentiary hearing regarding these tapes. On March 6, 1986, Judge McRae ordered the tapes suppressed. The United States filed its Motion to Reconsider on March 31, 1986. On April 4, 1986, the United States filed a Notice of Appeal. Judge McRae denied the Motion to Reconsider on April 8, 1986.

The United States perfected its appeal to the Court of Appeals for the Sixth Circuit.

In its Opinion dated March 6, 1987, the Court of Appeals for the Sixth Circuit reversed the judgment of the District Court.

The relevant facts underlying the indictments handed down by the Federal Grand Jury for the Western District of Tennessee are as follows:

On March 23, 1985, a federal search warrant was served at an apartment registered to Defendant, Dan Rokitka. Rokitka and Howard "Ace" Underhill were present at the time of the search. Agents seized linesheets, gambling paraphernalia, and records. Also seized were cassette tapes found in and near tape recorders hooked to the telephone in the apartment. While agents were executing the search warrants, the phones in the apartment continued to ring. Agents answering the phones found the calls were for the purpose of placing bets. Agents who executed the search turned the seized evidence over to Special Agent Richard Gray of the Federal Bureau of Investigation.

Gray reviewed the evidence. Gray testified at the suppression hearing.

In Gray's opinion, a bookmaking operation was being carried out at Rokitka's apartment.

Special Agent Gray listened to fifteen (15) tapes seized at Rokitka's apartment. The

subject matter of the tapes was the exchange of gambling information. Gray determined, from listening to the tapes, that the phones were manned by Dan Rokitka and Howard "Ace" Underhill. In one of the recorded conversations between Underhill and Jane Egan, the parties to the conversation discussed problems with certain bettors who, upon losing a bet, would claim they had bet less than they had. [1]

Underhill told Egan that he started recording all of his bets. Special Agent Gray testified that he interviewed Dan Rokitka in the presence of his attorney and Rokitka stated that the purpose of the recordings was to record bets. Gray recalled an incident recorded on

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[1] Jane Egan is a defendant in United States vs. Bill Harlow and Jane Egan, 85-2023-G in the Western District of Tennessee. That indictment also charged violations of federal gambling laws. Ms. Egan filed a Motion to Suppress the same tapes before District Judge Julia S. Gibbons. Her motion as well as the motion of the co-defendant, Bill Harlow, was based on the same theory as the Defendants in the case before this Court argued. Judge Gibbons denied Ms. Egan's motion.

one tape where a caller had a disagreement about a wager. Rokitka played the tape of the bet back. Playing back the tape apparently ended the disagreement.

The tapes in question contained conversations between Underhill and Rokitka and Defendants, Walter Person, Eddie Osborne, Joe Osborne, Pat Tata and Tony Rayburn. The conversations involved the exchange of gambling information and the placing of wagers. All tapes contained either Rokitka or Underhill as a party to the conversation.

H. ARGUMENT

According to Rule 17 of the Rules of the United States Supreme Court, the following list indicates the character of reasons that will be considered in granting a review on certiorari:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner, Tony Rayburn, respectfully insists that the case before this Court satisfies the requirements of subsections (a) and

(c) of Rule 17.

In its decision dated March 6, 1987, the Court of Appeals for the Sixth Circuit addressed the question of "whether the participants in an illegal gambling business, some of whom caused their recorded telephone conversations to be intercepted and recorded, are entitled to have these recordings suppressed during a prosecution for violation of federal anti-gambling statutes."

The answer hinged the Court's construction of various provisions of the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510, et seq. (1982) (hereinafter referred to as "Title III" or the "Act").

The Court of Appeals quoted the exclusionary provision of the Act contained at 18 U.S.C. §2515:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any

> court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The Court of Appeals determined that §2515 is not self executing. An aggrieved person may move to suppress the contents of an intercepted communication pursuant to 18 U.S.C. §2518(10)(a) (i). Section 2510(11) defines an aggrieved person as one "who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

As the Court noted, §2511(1)(a) prohibits all willful interceptions of wire and oral communications unless a specific section of the statutes excepts a particular interception. Section 2511(1)(c) prohibits willful disclosure of the contents of communications by a person who knows or has reason to know that information was obtained through an unlawful interception.

Section 2511(2) lists the exceptions to the general proscription against interceptions.

The Defendants contended before the Sixth Circuit that the only exception which could render the tapes legal did not apply because of the purpose for which Defendants Rokitka and Underhill made the tapes. Specifically, the Defendants referred to 18 U.S.C. §2511(2)(d):

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

The District Court found the language of this statute clear and unambiguous and, therefore, felt compelled to comply with its command. The Court of Appeals, however, reached beyond the plain language of this statute to achieve a different result.

The Court of Appeals acknowledged that

the precise question presented in this case has not been decided by the Supreme Court of the United States or another Court of Appeals. The provisions of the Act under review, however, have been considered in other settings.

In deciding the case, the Court of Appeals for the Sixth Circuit employed the following analysis. According to the Court of Appeals, the primary purpose of the Omnibus Crime Control Act is to provide a more effective means for combating organized crime in the United States. The second purpose of the Act is to prohibit all other interceptions and disclosures of wire and oral communications unless specifically authorized by provisions of the Act. (Op. at 8-9). The Court determined that since the interceptions in question were made by private individuals not acting under any color of law, Section 2511(2)(d) is the only exception arguably applicable.

The Court of Appeals concluded that the legality of an interception is determined by the purpose for which the interception is made, not

by the subject of the communication intercepted. Citing United States v. Truglio, 731 F.2d 1123, 1131 (4th Cir.), cert. denied, 105 S.Ct. 197 (1984). The Court observed that generally when the purpose of an interception is to make an accurate record of a conversation with the intention of preventing future distortions by a participant, the interception is legal. Citing, By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956, 959 (7th Cir. 1982); United States v. Phillips, 564 F.2d 32, 33 (8th Cir. 1977).

According to the Court of Appeals' Opinion at pages 9 and 10, Underhill and Rokitka testified that the purpose of taping the conversations was to make a record to settle any future disputes about the terms of betting transactions. The Court's statement is not accurate. Underhill and Rokitka did not testify at the suppression hearing. Rather, Agent Gray testified about his conversations with Underhill and Rokitka.

The Court further addressed the issue of whether the interceptions were made "for the

purpose of committing any criminal . . . act" under the laws of the State of Tennessee. The Court of Appeals stated that the recording was not an element of the criminal transaction of making and accepting bets. The transactions were unlawful in and of themselves. The recordings added nothing. The Court noted, however, that the taping of the conversations did make a gambling record as defined in Tennessee Code Annotated §39-6-601(7) and T.C.A. §39-6-602(e). T.C.A. §39-6-602(e) makes it a misdemeanor to knowingly make, possess or store a gambling record. The Court of Appeals concluded that the communications were intercepted for the purpose of committing a criminal act.

The Court did not end its inquiry, however. The Court further addressed the issue of whether the exclusionary rule contained in §2515 applied to the circumstances of this case.

In its analysis of this issue, the Court of Appeals addressed the appropriate standard to be used in construing statutes.

The Court recognized the general rule

that when the intent of Congress is expressed in plain term the Court must treat that language as conclusive. Citing, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982). The Court of Appeals strayed, however, from the general rule, relying upon the case of United States v. American Trucking Associations, Inc., 310 U.S. 534, 542-44 (1940).

The Court of Appeals acknowledged that the Supreme Court in Gelbard v. United States, 408 U.S. 41, 48 (1972), described the protection of privacy as the overriding congressional concern behind enactment of Title III. The Sixth Circuit stated that the Act provided protection to the victims of unlawful interceptions, not to the perpetrator. The Court of Appeals concluded:

> We think it is clear that Congress did not intend for §2515 to shield the very people who committed the wrongful interceptions from the consequences of their wrongdoing. Underhill and Rokitka waived their right of privacy in these communications by their deliberate act of causing them to be recorded. If the language of §§2511(2)(d) and 2515 were applied literally to Underhill and Rokitka it would produce an absurd result that we are confident Congress did not intend.

The Court of Appeals rejected Defendant Person's argument that he did not consent to the interception of his conversations and, therefore, was entitled to suppress the tapes containing his conversations. According to the Court of Appeals, if Person had been a mere customer of a gambling establishment, this argument would have merit. Since Person was a confederate of Underhill and Rokitka, the Court ruled that he waived his right of privacy in the conversations. Because all of the Appellees were charged with conspiracy, the Court held the individual defendants bound by the acts of the co-conspirators. Citing, Pinkerton v. United States, 328 U.S. 640, 646-48 (1946); United States v. Bowers, 739 F.2d 1050, 1052 (6th Cir.), cert. denied sub nom., Oakes v. United States, 469 U.S. 861 (1984).

For the following reasons, Defendant, Tony Rayburn, respectfully insists that the Court of Appeals was in error in reversing the judgment of the District Court.

(1) Recordings of telephone conversations made by certain Defendants were inadmissible

because the Federal Wiretap Act bans the use of the fruits of interceptions made for the purpose of committing a criminal act.

Defendant, Tony Rayburn, insists that the tapes seized by the Government in the case before this Court do not meet the requirements of Rule 901 and Rule 1002 of the Federal Rules of Evidence. Moreover, Defendant Rayburn insists that the information contained therein was obtained in violation of 18 U.S.C. §2510, et seq.

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §2510, et seq. Sections 2511(2)(d), 2515 and 2518(10)(a) apply to the case before this Court.

18 U.S.C. §2511(2)(d) provides as follows:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the

Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

18 U.S.C. §2515 provides as follows:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. §2518(10)(a) provides as follows:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the ground that -
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted

> is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may, in his discretion, make available to the aggrieved person or his counsel for inspection such portions of the interception communication or evidence derived therefrom as the judge determines to be in the interest of justice.

The indictments in the cases before this Court charged the Defendants with violating and conspiring to violate 18 U.S.C. §1955 by conducting illegal gambling businesses in violation of T.C.A. §§39-6-601, 39-6-602, 39-6-603, 39-6-604, 39-6-607, 39-6-608, 39-6-610, and 39-6-611.

Section 1955 provides, in pertinent part, as follows:

Prohibition of Illegal Gambling Businesses. (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section --

(1) "Illegal gambling business" means a gambling business which - (i) is a violation of the law of this State, or a political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantial continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "Gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenues

in excess of $2,000 in any single day shall be deemed to have been established.

T.C.A. 39-6-602(e) and 39-6-603(a) provide as follows:

> (e) Whoever knowingly prints, makes, possesses, stores, or transports any gambling record, or buys, sells, offers or solicits any interest therein, whether through an agent or employee, or otherwise, shall be guilty of a misdemeanor and shall be fined not more than five hundred dollars ($500.00) and, in the discretion of the Court, imprisoned in the county jail or workhouse for a period of time not more than six (6) months, and in the enforcement of this subsection, direct possession of any gambling records shall be presumed to be knowing possession thereof.
>
> . . .
>
> (a) Whoever knowingly transmits or receives gambling information by telephone, telegraph, radio, semaphore, or similar means, or knowingly installs or maintains equipment for the transmission or receipt of gambling information, shall be fined not more than one thousand dollars ($1,000), or imprisoned not more than one (1) year, or both.

Judge McRae found that Rokitka and Under-Hill made the tapes for the purpose of recording bets; therefore, these Defendants made the

tapes for the purpose of committing a criminal act under the laws of the State of Tennessee regarding gambling, gambling records, and transmitting gambling information. Judge McRae ordered the tapes suppressed under §2515. Defendant Rayburn respectfully insists that Judge McRae correctly interpreted and applied §§2511(2)(d) and 2515 according to the plain meaning of the statutory language.

(2) Criminal statutes should be strictly construed; however, the Court of Appeals did not strictly construe the Federal Wiretap Act in its decision dated March 6, 1987, but, rather, construed the statute as if it were a civil statute, despite its plain meaning.

The Court of Appeals acknowledged the general rule that the plain language of a statute ordinarily defines the purpose of the legislation. Citing, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982). The Court of Appeals argued that a plain reading of §§2511(2)(d) and 2515 led to an absurd result. The Court cited United States v. American

Trucking Associations, Inc., 310 U.S. 534 (1940) in support of this proposition.

In the American Trucking case, the Supreme Court considered whether the Interstate Commerce Commission's power under the Motor Carrier Act of 1935 to establish reasonable requirements with respect to the qualifications of maximum hours of service of employees of motor carriers extended to employees other than those whose duties affected safety of operation. Id. at 538. The Court restricted the meaning of employees to those employees whose activities affected the safety of operation. Id. at 553.

In the Griffin case, in contrast, the Court literally applied the statute in question. The Griffin case concerned the application of 46 U.S.C. §596, repealed Aug. 8, 1983, which required vessel owners and masters to promptly pay seamen after their discharge from service. Section 596 further authorized seamen to recover double wages for each day payment was delayed without sufficient cause. The Supreme

Court addressed the issue of whether district courts may, in their discretion, limit the period during which wage penalty accrues or whether imposition of the penalty for each day of delay is mandatory. Id. at 565-566. The Court held that the plain meaning of §596 left no room for discretion in deciding whether to exact payment or in choosing the time period for calculating payment. Id. at 570. The Court stated:

> "Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" Consumer Product Safety Comm'n v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980).

Id. at 570.

In the Griffin case, Oceanic Contractors, Inc. argued that a literal interpretation of §596 would produce an absurd result. The Court recognized that interpretations which would produce absurd results are to be avoided if alternative interpretations are consistent with the legislative purpose. Id. at 575

(citing, United States v. American Trucking Associations, Inc., 310 U.S. 542-543; Haggar v. Helvering, 308 U.S. 389, 394 (1940)). The Court refused to nullify §596 however hard or unexpected its effects:

> Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievious, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts. Crooks vs. Harrelson, 282 U.S. 55, 60 (1930).

Id. at 575.

The statutue in the case before this Court is clear on its face. Section 2511(1) prohibits interception or disclosure of wire or oral communications under specific circumstances, "[e]xcept as otherwise specifically provided under this chapter."

Section 2511(2)(d) provides that it is not unlawful for a private person to intercept a wire or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior

consent to the interception "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution of the United States or of any State or for the purpose of committing any other injurious act."

Under Tennessee law, it is a crime to knowingly print, make, possess, store or transport any gambling record. T.C.A. 39-6-602(3). Under Tennessee law, it is a crime to knowingly transmit or receive gambling information by telephone, telegraph, radio, semaphore, or similar means. T.C.A. §39-6-603(a). Under §2511(2)(d), the interception in the case before this Court was unlawful under the plain meaning of the statute. Section 2515, consequently, prohibits the use in evidence of an interception or its contents if the disclosure of that information violates Title III of the Omnibus Crime Control and Safe Street Acts. Again, the statutory language is plain and unambiguous.

In its decision to reverse the district

court, the Court of Appeals relied upon Gelbard v. United States, 408 U.S. 41 (1972). In Gelbard, the Court addressed the question of whether grand jury witnesses are entitled to invoke §2515's prohibition as a defense to contempt charges brought against them for refusing to testify. The Court concluded that they are entitled to do so. Id. at 43. The Court stated:

. . .

> Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, 18 U.S.C. §2511(1), and the victim of such interception, disclosure or use, is entitled to recover civil damages. 18 U.S.C. §2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, 18 U.S.C. §2515, and provides procedures for moving to suppress such evidence in various proceedings. 18 U.S.C. §2518(9) through (10).

In Gelbard, the Court referred to the unequivocal language of §2515 which expressed the "fundamental policy" adopted by Congress

concerning wiretapping and electronic surveillance. Id. at 47. The Court recognized the protection of privacy as the overriding concern of Congress in enacting Title III. Id. at 48. According to the Court:

> Section 2515 is thus central to the legislative scheme. Its importance as a protection for the "victim of an unlawful invasion of privacy" could not be more clear. The purposes of §2515 and Title III as a whole would be subverted were the plain command of §2515 ignored when the victim of illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, §2515 serves not only to protect the privacy of communications, but also to insure that the courts do not become partners to illegal conduct; the evidentiary prohibition was enacted also to protect the integrity of courts in administrative proceedings.

Id. at 51 (footnotes omitted).

Thus, although the Court of Appeals' Opinion in the case before this Court relies upon the Gelbard decision, it conflicts with that decision.

(3) The decision of the Court of Appeals for the Sixth Circuit entered March 6,1987 conflicts as well with the decision of the Court of Appeals for the Eighth Circuit on the same mat-

ter in United States v. Phillips, 540 F.2d 319 (8th Cir.), rehearing denied, (8th Cir.), cert. denied 429 U.S. 1000 (1976) and with the decision of the Sixth Circuit in United States v. Jones, 542 F.2d 661 (6th Cir. 1976).

In the Phillips case, the Eighth Circuit interpreted the section of the Omnibus Crime Control and Safe Streets Act pertinent to the case before this Court. In the Phillips case, the Defendant appealed his conviction of perjury. The Eighth Circuit vacated the conviction and remanded the case for further proceedings.

The Defendant Phillips was prosecuted for knowingly making false material statements before a grand jury. The grand jury convened in 1971 to investigate a conspiracy involving persons allegedly engaged in organized crime in Kansas City, Missouri and in Northeastern Oklahoma. The alleged objective of the conspiracy was to establish prostitution activities and illegal gambling in Oklahoma nightclubs by offering bribes to local government officials in return

for protection from law enforcement.

A principal target of the grand jury probe was Frank Grayson, an Oklahoma District Attorney. Grayson allegedly provided protection for gambling at certain local clubs. Defendant Phillips, at the time, was a practicing attorney, an Oklahoma State Senator, a close friend and political supporter of Mr. Grayson. According to Grayson's testimony before the grand jury, certain persons told him that Phillips had stated that he controlled Grayson. Specifically, Grayson testified that Charles Davis, the owner of the Shangri La lounge, stated that Phillips could arrange anything Davis needed in the way of protection.

Phillips was called before the grand jury. The Defendant repeatedly denied that he had ever stated to anyone that he could arrange protection. In addition, Defendant Phillips denied that he made any representation to persons affiliated with the Shangri La.

At his trial on the charge of perjury, the

critical evidence was a tape recorded meeting between Phillips, Davis and George Overton, the manager of the Shangri La. A private detective recorded the conversation. The detective did not act under color of the law but, rather, Davis and Overton arranged for the recording. Phillips was not aware that the conversation was being recorded. The purpose of the meeting was to settle a fee arrangement between Phillips and the Shangri La; however, the purpose of recording the conversation was unknown. During the course of the conversation, the Defendant told Davis and Overton that the Shangri La could run illegal liquor and gambling operations on a limited basis. During the conversation, Phillips stated, "I can, I can control Frank[,]" in reference to District Attorney Grayson.

At the trial on the perjury charge, the Government's theory was that the Defendant's statement to the effect that he could "control Frank" was a representation that he could induce Mr. Grayson to produce protection for Shangri

La's illegal activities.

Prior to trial, the Defendant filed a motion to suppress the tape recording on the grounds that it was recorded in violation of the Omnibus Crime Control and Safe Streets Act of 1968. In addition, he also moved to suppress the tape on the grounds that he was not admonished of his Miranda rights before testifying before the grand jury. The trial court denied the motion and admitted the tape and its contents.

On appeal, Defendant Phillips alleged that the conversation in question was recorded for the purpose of committing a tortious act in violation of §2511(2)(d).

At trial, no evidence was presented as to why Davis and Overton recorded the conversation. The Eighth Circuit held that the ultimate burden rests with the Defendant to show that the tape was "unlawfully" recorded. The Eighth Circuit determined that the Defendant in the Phillips case was denied a meaningful opportunity to meet the burden. The Eighth Circuit vacated the

judgment of conviction and remanded the case for hearing to afford the State and the Defendant an opportunity to present evidence as to the purpose of the recording. According to the Court, the effect of §2511(2)(d) is to prohibit any interception, use, or disclosure of a communication by a person not acting under color of law when the purpose is to commit a criminal, tortious or injurious act.

According to the Court, this determination must be made on a case by case basis. Id. at 325 (citing, Meredith v. Gavin, 446 F.2d 794, 798 (8th Cir. 1971).

The Eighth Circuit further reviewed the sections of the Act providing for sanctions for its violation. Under §2515, any oral communication intercepted in violation of the Act should not be received into evidence in a judicial proceeding. Section 2518(10)(a) provides that an aggrieved person may file a motion to suppress the contents of an unlawfully intercepted communication.

The Eighth Circuit further stated:

> Logic requires that the party against whom the evidence is offered, the defendant here, carry the ultimate burden of alleging and proving the specific criminal, tortious, or other injurious purpose for which the interception was made. Id. at 326.

The Eighth Circuit noted, however, that the party seeking to suppress such matter must be given an opportunity to meet his or her burden of proof. The Court stated:

> On remand, the trial judge should require the Government to call the parties responsible for the interception and establish a legal purpose for the interception. If this obligation is met, the Defendant must prove, by a preponderance of the evidence, the existence of one of the exceptions listed in §2511(2)(d). The risk of nonpersuasion shall remain with the defendant. Id.

The Eighth Circuit remanded the case to district court for a hearing to determine the purpose for which the conversation was recorded. If Davis and Overton made the recording for a legitimate purpose, the Eighth Circuit stated that the judgment of conviction must be reinstated. If, however, the defendant proved by a preponderance of the evidence that Davis and

Overton made the recording for a criminal, tortious or other injurious purpose, the tape had to be suppressed. In the event of a suppression, a new trial would be necessary.

The analysis in the Phillips case is consistent with the District Court's ruling in the case before this Court. The District Court's ruling is consistent with the legislative history of the Act. A statement by Senator Hart concerning the Act follows:

> In the substitute that is now pending, we propose to prohibit a one-party consent tap, except for law enforcement officials, and for private persons who act in a defensive fashion. In other words, whenever a private person acts in such situations with an unlawful motive, he will violate the criminal provisions of Title III and will also be subject to a civil suit. Such one-party consent is also prohibited when a party acts in any way with an intent to injure the other party to the conversation in any other way. For example, the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him. The provision would not, however, prohibit such activity when the party records information of criminal activity by the other party with the purpose of taking such information to the police as evidence. Nor does it prohibit such recording in other

> situations when the party acts out of a legitimate desire to protect himself and his own conversations from later distortion or other unlawful or injurious acts by the other party.

114 Cong. Rec. 14694-14695 (May 23, 1968).

In the case before this Court, the Government's own witness testified that the interception was committed in furtherance of a criminal act, violation of Tennessee's gambling laws. Compare United States v. Traficant, 558 F.Supp. 996 (N.D. Ohio 1983) (evidence did not establish the defendant's argument that tape recordings were made for the purpose of blackmailing him or for any other illegal purpose.)

The Government did not call Rokitka or Underhill as witnesses or in any way establish a legitimate purpose for the interception. Therefore, Judge McRae properly suppressed the tapes as to Defendant Rayburn.

The ruling in United States v. Jones, 542 F.2d 661 (6th Cir. 1976) is consistent with Judge McRae's ruling. In Jones, the Court of Appeals addressed the question of whether Title III applies

to interspousal wiretaps. The Court held the statute applicable stating:

> Although the primary target of the bill was organized crime, the Senate Report makes it clear that the purpose of the bill was to establish an across-the-board prohibition on all unauthorized electronic surveillance. . .

I. CONCLUSION

The precise question presented in this case has not been decided by the Supreme Court or a Court of Appeals although the provisions of the Act under review hav been considered in other settings.

For this reason, and for the foregoing reasons, Defendant, Tony Rayburn, respectfully requests this Court to grant his petition in this cause for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to hear and decide his case on oral argument and briefs.

Respectfully submitted,

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April, 1987

J. CERTIFICATE OF SERVICE

I, James D. Causey, Attorney for Petitioner, hereby certify that I have this ___ day of April, 1987, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable W. Hickman Ewing, United States Attorney, Federal Building, Memphis, Tennessee 38103, Mr. Frederick H. Godwin, Assistant United States Attorney, Federal Building, Memphis, Tennessee 38103, Solicitor General, Department of Justice, Washington, D. C. 20530, Mr. Albert Boyd, Attorney-At-Law, 424 North McNeil, Memphis, Tennessee 38103, Mr. Robert M. Friedman, Attorney-At-Law, Suite 3010 - 100 North Main Bldg., Memphis, Tennessee 38103, Mr. Tommy Jagendorf, Attorney-At-Law, 5248 Pellum Circle, Memphis, Tennessee 38117, Mr. Steve Butler, Attorney-At-Law, 22 N. Front Street, Suite 1020, Memphis, Tennessee 38103, Mr. John P. Colton, Jr., Attorney-At-Law, 629 Poplar Avenue, Memphis, Tennessee 38105, and

Mr. Frank Holloman, Attorney-At-Law, 240 Poplar Avenue, Memphis, Tennessee 38103, copies of the foregoing Petition for Writ of Certiorari filed by Tony Rayburn, by placing copies of the same in the United States Mail, properly addressed, and with sufficient postage affixed thereto.

James D. Causey